Supreme Court, U.S.
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No. 91-105 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1991

TINO VILLANUEVA,
PETITIONER,

v.

WELLESLEY COLLEGE,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENT WELLESLEY COLLEGE IN OPPOSITION

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The respondent, Wellesley College, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the First Circuit's opinion in this case. That opinion is reported at 930 F.2d 124 (1991).

STATEMENT OF THE CASE

Petitioner was employed in the Department of Spanish at Wellesley College, first as a part-time instructor and then, starting in 1980, as a full-time assistant professor teaching, among other things, courses in Spanish language and Spanish and Chicano literature.

Petitioner was considered for tenure at Wellesley in the 1985-86 academic year. In accordance with the procedures then in effect, the Spanish Department Reappointments and Promotions Committee (the "R&P Committee"), consisting of the tenured members of the Department, met and considered whether to recommend petitioner for tenure on the basis of the five criteria specified in the College's tenure procedures: teaching, scholarship, structure of the department, service to Wellesley, and external professional activities.

In October, 1985, the R&P Committee recommended to the College's Committee on Faculty Appointments ("CFA"), by a vote of three to one, against tenure for petitioner. The majority explained that, in their view, the pace of petitioner's teaching was too slow, his student evaluations ("SEQs") were not of the superior quality the R&P Committee was seeking in a tenured professor, and he had not shown in his scholarship that he was current on the latest trends of literary criticism. The majority also stated that, while petitioner had complied with requests from his colleagues, he had not taken the initiative either to promote Department activities or to handle major Department responsibilities. Finally, with respect to Department structure, the majority noted, among other things, that the next member of the Department in line to be considered for tenure had impressive credentials.

The CFA voted to accept the R&P Committee's recommendation against tenure. The CFA consisted of five tenured faculty members elected by the faculty at large, the Dean and

the President of the College, and a black tenured faculty member selected by the black faculty at the College.

Dean Maud H. Chaplin and Associate Dean Edward A. Stettner furnished petitioner with a letter summarizing the reasons the CFA voted to deny plaintiff tenure. In reaching its decision, the CFA determined that petitioner's teaching was "much more than adequate, but it was not outstanding," and that his SEQ's were not as strong as those of many other language department tenure candidates. The CFA found that letters from outside evaluators of petitioner's published work were reserved as to its merit, while in many cases the evaluations were more enthusiastic. The CFA also noted that petitioner's service to the College community was not the strongest part of his record.

After petitioner's request for reconsideration, the CFA again voted against tenure in April 1986. Petitioner subsequently filed charges with the federal Equal Employment Opportunity Commission (the "EEOC") and the Massachusetts Commission Against Discrimination (the "MCAD") alleging that he was denied tenure at Wellesley because of his race, color, national origin, sex and age. After conducting an investigation, the EEOC on May 28, 1987, determined that there was no probable cause to believe petitioner's allegations of discrimination. The MCAD accorded substantial weight to the determination of the EEOC and on June 10, 1987 entered its own finding of lack of probable cause.

Thereafter, on August 11, 1987, petitioner filed a complaint against Wellesley in the United States District Court for the District of Massachusetts alleging that the denial of tenure to him had been based on his race, color, national origin, sex and age in violation of, among other statutes, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 *et seq.* ("Title VII"). Following extensive discovery, Wellesley filed motions for summary judgment dismissing all of petitioner's claims. The

case was referred to Magistrate Lawrence P. Cohen for recommended disposition.

On June 14, 1990, the Magistrate recommended allowance of Wellesley's motions. The Magistrate, for the purposes of the summary judgment motions, assumed that petitioner had established a *prima facie* case of discrimination, but also found that Wellesley had met its burden of articulating legitimate, nondiscriminatory reasons for denying tenure. Most important, the Magistrate found that petitioner had failed to produce "sufficient evidence by which a rational trier of fact — short of mere speculation or conjecture — could reasonably conclude that the legitimate, non-discriminatory reason advanced by Wellesley for denying [petitioner's] tenure bid was a pretext for illegal discrimination." On August 17, 1990, the District Court overruled petitioner's objections and entered an Order allowing Wellesley's motions for summary judgment for the reasons set forth in the Magistrate's report.

The First Circuit affirmed, concluding that "the undisputed evidence does not raise a genuine issue of material fact as to differential treatment based on impermissible discrimination." Applying the three-step burden-shifting analysis applicable to "disparate treatment" cases under Title VII (see *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-254 (1981), *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-805 (1973)), the First Circuit concluded that petitioner had made out a *prima facie* case, but that Wellesley had articulated a legitimate, nondiscriminatory reason for its tenure decision: that petitioner was not sufficiently excellent in any of the five categories the College uses in assessing tenure candidacies. It was therefore petitioner's burden to raise a genuine issue of material fact that Wellesley's articulated reasons were pretextual. The heart of the First Circuit's decision was that:

> "Although Villanueva has presented evidence showing that he was qualified for tenure, he has not demonstrated

that Wellesley's justification was a pretext; *a fortiori*, he has not shown that it was a pretext for discrimination."

REASONS FOR DENYING THE WRIT

The writ should be denied because the decision of the First Circuit is consistent with the decisions of this Court, and of other courts of appeal, and the petition does not present any issue warranting review by this Court. More particularly, the decision of the First Circuit does not present the questions asserted by petitioner.

1. The First Circuit did not impose a "greater burden of proof ... in an academic tenure case." Pet. i. It simply applied the established rule that summary judgment is appropriate unless plaintiff produces evidence that is admissible and "significantly probative" of the claims he has made. *E.g.*, *Anderson* v.. *Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986); *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-26 (1986).

The First Circuit concluded that petitioner had not presented any evidence that tended to prove that the reasons articulated by the College for the tenure denial were a pretext. With respect to petitioner's effort to compare his qualifications with others who had been granted tenure in the Spanish Department, the First Circuit found that:

> "the undisputed evidence shows that while [the] qualifications [of the two relevant candidates for comparative purposes] may have been less than or equal to Villanueva's in certain areas, both [other candidates] excelled in other areas. [One] had received a number of teaching awards, and [the other] was extraordinarily active in her service to the college community." Pet. A-13, A-14.

The First Circuit found that "nothing in Villanueva's comparative evidence raises the slightest inference that a discriminatory motive lurked beneath the surface." Pet. A-14. With respect to Villanueva's reliance upon certain statistics, the First Circuit properly found that those statistics were inadequate in the absence of, among other things, information about the composition of the relevant labor market. Pet. A-14, citing *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642, 650-1 (1989).

The First Circuit did not create a "special privilege" for academic institutions. On the contrary, the First Circuit specifically recognized that "Congress has committed to the federal courts a duty which we may not abdicate: that of eliminating workplace discrimination, *within educational settings as well as without* . . . Academic freedom does not embrace the freedom to discriminate." Pet. A-8, A-9 (emphasis added). The "special considerations" adverted to by the First Circuit had nothing to do with a "special privilege" for academic institutions. Rather, the First Circuit was simply referring to two common sense propositions. First, the nature and type of evidence that establishes a *prima facie* case of discrimination, or that establishes pretext, will vary "[d]epending on the facts and circumstances of each case." (Pet. A-6, A-7). Recognizing these differences does not change the burden of proof which a plaintiff must meet. It is true in all Title VII cases, as the First Circuit held in this case, that the plaintiff must convince a jury that the employer's articulated reasons were not merely mistaken but that they were pretextual.

The second proposition follows from the first: In Title VII cases, whether involving tenure or otherwise, the court or jury is not entitled to substitute its judgment as to the wisdom of the employer's decision, but only to determine whether the employer's decision resulted from unlawful discrimination. See generally *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 242 (1989) (plurality opinion) ("The other important aspect of

[Title VII] is its preservation of an employer's remaining freedom of choice"). The First Circuit therefore recognized that it was not its function to sit as a "supertenure" committee, judging the "wisdom" of the tenure denial, and that it would intrude on academic freedom, and exceed the Court's authority under Title VII, if it attempted to exercise any such role. These observations were manifestly correct and consistent with the purposes of Title VII. See also *Zahorik* v. *Cornell University*, 729 F.2d 85, 94 (2nd Cir. 1984) ("Absent evidence sufficient to support a finding that such disagreements or doubts [about tenure qualifications] are influenced by forbidden considerations such as sex or race, universities are free to establish departmental priorities, to set their own required levels of academic potential and achievements and to act upon the good faith judgments of their departmental faculties or reviewing authorities.")

2. The First Circuit in this case did not require petitioner "to adduce some evidence of prohibited discrimination in addition to rebutting the employer's nondiscriminatory explanation." Pet. i. Petitioner's case failed because he *did not rebut* the College's nondiscriminatory explanation: "In our judgment, Villanueva failed to rebut Wellesley's justification." Pet. A-13. The petitioner *did not show* that the College's articulated reasons were pretextual: "[Villanueva] has not demonstrated that Wellesley's justification was a pretext; *a fortiori*, he has not shown that it was a pretext for discrimination." *Id.* Accordingly, this case does not present the question whether a Title VII plaintiff can be required to do more than rebut the employer's proffered justification in order to defeat a motion for summary judgment.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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